

Remarks

Claims 1-45 are pending in the application. Claim 45 was allowed and has been amended for clerical reasons. All other claims were rejected. No other claims have been amended or cancelled herein.

Rejection of Claims 1-44 Under 35 U.S.C. §101

Claims 1-44 have been rejected under 35 U.S.C. §101 as claiming the same invention as that of claims 1-44 of Holmquist (U.S. Patent 6,752,525).

CLAIM 1

Claim 1 is restated below for reference purposes:

A light emitter comprising:
a tube having a first end and a second end;
a first aperture located proximate said tube first end;
a second aperture located proximate said tube second end;
a lens located within said tube;
a base mechanism attached to said tube first end, said base mechanism having a cavity formed therein; and
a light path extending between said cavity and said second aperture, said light path passing through said first aperture and through said lens.

According to the office action, the limitations of claim 1 are disclosed by claim 1 of Holmquist. Claim 1 of the Holmquist is restated as follows:

1. A light emitter comprising:
a tube having a first end and a second end;
a first aperture located proximate said tube first end;

a second aperture located proximate said tube second end;
a lens located within said tube;

a base mechanism attached to said tube first end, said base mechanism having a cavity formed therein and at least one flexible member extending from said base mechanism, said at least one flexible member having a tab attached thereto; and

a light path extending between said cavity and said second aperture, said light path passing through said first aperture and through said lens.

The portion of Holmquist presented in bold type is not present in claim 1 of the pending application. Thus, claim 1 of the pending application is different than claim 1 of Holmquist.

Section 804(II)(A) of the MPEP sets forth a test for double patenting under 35 U.S.C. §101. The test is whether a claim in the application could be literally infringed without literally infringing a corresponding claim in the patent. In order to clarify the test, the MPEP further states if there is an embodiment of the invention that falls within the scope of one claim, but not the other, then identical subject matter is not defined by both claims and statutory double patenting does not exist.

The applicants note that the Holmquist patent includes the embodiment of the at least one flexible member, which is not present in the pending claim 1. Therefore, Holmquist requires the flexible member, which is not required in pending claim 1. A device without a flexible member could literally infringe claim 1, but could not literally infringe Holmquest. Thus, identical subject matter does not exist and statutory double patenting cannot exist.

Based on the foregoing, the applicants contend that the rejection of claim 1 has been overcome and request reconsideration of the rejection.

CLAIMS 18 AND 32

Claims 18 and 32 are independent and were rejected over claims 18 and 32 of Holmquist. The applicants note that claims 18 and 32 of Holmquist contain similar

limitations as set forth above with respect to claim 1 of Holmquist. These embodiments are not present in the pending claims 18 and 32. Thus, statutory double patenting cannot exist.

Based on the foregoing, claims 18 and 32 cannot be similar to claims 18 and 32 of Holmquist. Therefore, the applicants request reconsideration of the rejections.

CLAIMS 2-17 AND 33-43

Claims 2-17 and 33-43 are dependent on allowable independent claims and are deemed allowable by way of their dependence and for other reasons.

In view of the above, all of the pending claims are now believed to be in condition for allowance and a notice to that effect is earnestly solicited.

Respectfully submitted,
KLAAS, LAW, O'MEARA & MALKIN, P.C.

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